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Administrative Directive

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To:	Commissioners of Social Services Executive Directors of Voluntary Authorized Agencies
Issuing Division/Office:	Strategic Planning and Policy Development
Date:	December 11, 2006
Subject:	2006 State Adoption, Termination of Parental Rights and Surrender Legislation
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Contact Person(s):	See Page 8
Attachments:	No
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I. Purpose

The purpose of this Administrative Directive is to advise local departments of social services (LDSS) and voluntary authorized agencies of the provisions of four recently enacted pieces of legislation that impact adoption practice, surrenders and the termination of parental rights (TPR). This Administrative Directive will also provide direction in relation to implementing the new laws, as is necessary. The new laws are:

- *Chapter 185 of the Laws of 2006* (effective October 24, 2006) – amended the Family Court Act (FCA), Social Services Law (SSL) and Domestic Relations Law (DRL) in relation to promoting "one family, one judge" in adoption, surrender and TPR proceedings
- *Chapter 372 of the Laws of 2006* (effective June 1, 2007) – amended the SSL to prohibit an attorney or law firm from representing or providing

legal services to both an authorized agency which has been involved in the foster care or adoption of the child and either the adoptive parents or the birth parents.

- *Chapter 460 of the Laws of 2006* (effective November 14, 2006) – amended the SSL to expand the grounds for termination of parental rights on the basis of severe abuse to add where a parent is convicted of certain categories of homicide where the victim is another child for whom the person is legally responsible or another parent of the child (with a possible exception for domestic violence circumstances).
- *Chapter 518 of the Laws of 2006* (effective August 16, 2006) – amended the Surrogate's Court Procedure Act and the SSL to support the continued payment of an adoption subsidy until an adopted child's 21st birthday where the adoptive parent(s) die after the child's 18th birthday. Further, it permits the appointment of a guardian for such child, with the child's consent, or a representative payee to receive the subsidy payments on behalf of the child, as well as authorizing the child herself or himself to directly receive the adoption subsidy payments under certain circumstances.

The text of these (and other 2006 child welfare-related) Chapter Laws can be accessed on the OCFS Internet:
http://www.ocfs.state.ny.us/main/legal/leg2006.asp

II. Background

Chapter 185 – Prior to this law taking effect, while practices might differ for individual cases and various county practices, there had not been a statutory mandate that surrenders of children who are in foster care as a result of either a voluntary placement agreement or an abuse or neglect proceeding must be executed or reviewed by the same Family Court and, where practicable, by the same judge involved in the foster care proceeding. Similarly, there has been no requirement for the Family Court and, where practicable, the same judge that was last involved in the child's foster care proceeding to hear the TPR proceeding. State law has provided that the Surrogate's Court shared jurisdiction for certain TPR proceedings with the Family Court, and there was no requirement for having such surrender or termination proceeding stay with the same judge whenever practicable.

Chapter 372 – There is currently a prohibition against an attorney or law firm serving as a legal representative or providing any legal services for both birth parents and adoptive parents in an adoption proceeding. However, prior to Chapter 372, there was no statutory prohibition dealing with the ability of an attorney or a law firm to provide legal services to an authorized agency and either the birth parents or adoptive parents.

Chapter 460 – A parent's rights to a child may be terminated if such child is "severely abused." Among the grounds for finding that a child is severely abused is the parent having been convicted of one of the category of crimes specified in

Section 384-b(8)(a)(iii)(A) of the SSL. The crimes listed in this section include murder in the first and second degree and manslaughter in the first and second degree, or attempt to commit murder or manslaughter in the first or second degree, but only when the victim was another child of the parent.

Chapter 518 – Prior to this law taking effect on August 16, 2006, if a child's adoptive parent(s) died between the child's 18th and 21st birthday, the law stated that subsidy payments could continue to whoever is duly appointed by the court as the legal guardian of the child, under the terms of the existing adoption subsidy agreement. However, for a significant group of these children, the courts have lacked the authority to appoint a legal guardian for a child who turns the age of eighteen. In addition, there was no statutory authority to make direct payment to the adoptee or another person designated as a representative payee for the adoption subsidy payment. As a result, the adopted child lost financial support that otherwise would have been available for her or his care.

III. Program Implications

Chapter 185 – Chapter 185 of the Laws of 2006 provides that when a child who is in foster care pursuant to Article 10 or 10-A of the FCA or section 358-a of the SSL is being surrendered, the surrender must be executed or filed in the court that exercised jurisdiction over the most recent permanency hearing or other proceeding involving the child, and, whenever practicable, be assigned to the same Family Court judge who presided at previous court appearances.

For adoption and TPR proceedings, the law provides a process to permit the court of original jurisdiction to determine whether it wishes to exercise jurisdiction over the aforementioned type of case proceedings.

Before hearing a TPR petition, the court in which the petition has been filed must determine whether the child is under the jurisdiction of another Family Court pursuant to a foster care placement or permanency hearing proceeding pursuant to Article 10 or 10-A of the FCA or section 358-a of the SSL. If the court in which the petition has been filed finds that the child is under the jurisdiction of another court, it must stay its proceeding for up to 30 days while it communicates on the record with the Family Court that exercised jurisdiction over the most recent proceeding, as well as provide an opportunity for the parties and law guardian to present facts and/or arguments prior to a determination about jurisdiction of the TPR proceeding being reached. The court that exercised jurisdiction over the most recent proceeding prior to the filing of the TPR petition must decide whether it should exercise jurisdiction over the TPR proceeding. If it decides it will exercise jurisdiction, then the petition must be transferred to such court no later than 35 days after the TPR petition was filed and assigned, wherever practicable, to the same judge that heard the last proceeding. If the court chooses not to exercise jurisdiction over the TPR proceeding, the court in which the TPR was filed must issue an order incorporating that determination and move forward in hearing the TPR petition forthwith.

A similar process is required when an adoption petition is filed. If the court where the adoption petition is filed determines that the child is under the jurisdiction of another court as a result of a placement order under Article 10 or 10-A of the FCA or section 358-a of the SSL, surrender or TPR order, it must stay the adoption proceeding and give the parties and law guardian an opportunity to present facts and legal arguments. The Family Court that exercised jurisdiction over the last permanency hearing or other proceeding must determine whether to retain jurisdiction for the purpose of the adoption proceeding. Chapter 185 enumerates the following factors, among others, for the Family Court that last exercised jurisdiction over the case to consider when determining whether it should hear the adoption petition:

- The relative familiarity of each court with the facts and circumstances regarding permanency planning for, and the needs and best interests of, the child;
- The ability of the law guardian to continue to represent the child in the adoption proceeding, if appropriate;
- The convenience of each court to the residence of the prospective adoptive parent or parents; and
- The relative ability of each court to hear and determine the adoption petition expeditiously.

The Office of Court Administration (OCA) has published new court forms that provide a mechanism to carry out the required determinations of prior Family Court jurisdiction and whether the prior Family Court should maintain jurisdiction for either the TPR or adoption proceeding. All OCA forms can be accessed on the OCA website at: http://www.courts.state.ny.us/forms/familycourt/index.shtml

Chapter 372

Chapter 372 of the Laws of 2006 provides that an attorney or law firm may not serve as the attorney or provide legal services to both an authorized agency and to the birth parent(s) or adoptive parent(s) where the authorized agency either is: providing adoption services to the birth parent(s) or adoptive parents(s); providing foster care for the child; or directly or indirectly involved in the placing out of the child for adoption. The rationale for this prohibition is to provide all the parties involved in the adoption process with legal counsel that independently advocates on such party's behalf and eliminates any actual or appearance of a conflict of interest. In order to allow sufficient time for agencies to take the necessary steps to discontinue dual legal representation that have been initiated and to avoid any potential delays of pending adoption proceedings, this prohibition does not become legally binding until the effective date of June 1, 2007. (Note: In relation to legal fees, an adoptive parent who adopts "a child with special needs", as defined in OCFS regulation 18 NYCRR 421.24(d)(2), is eligible for nonrecurring adoption expenses, up to $2000, which can include, among other things, reasonable and necessary attorney fees.)

Chapter 460

Chapter 460 of the Laws of 2006 expands the grounds for a TPR based on severe abuse to include instances where a parent had been convicted of murder or manslaughter in either the first or second degree, or attempt to commit such murder or manslaughter, against "another child for whose care such parent is or has been legally responsible" or "another parent of the child, unless the convicted parent was a victim of physical, sexual or psychological abuse by the decedent parent and such abuse was a factor in causing the homicide." Case planners for foster children and their supervisors should be made aware of the widening of the definition of "severe abuse" in the event that the fact pattern on one or more of their cases make it a candidate for consideration for initiating a termination proceeding.

Chapter 518

Chapter 518 of the Laws of 2006 addresses the issue of the continued availability of adoption subsidy for an adoptee between the ages of 18 and 21 when the adoptive parent(s) die after the adoptee's 18th birthday. When an LDSS that has been making adoption subsidy payments learns of such a circumstance, it must notify the child of the processes available to continue subsidy payments until the child's 21st birthday, as well as the right of the child to be involved in all such processes. Chapter 518 provides detailed guidance in relation to the potential processes for continuation of the subsidy payments, and essentially highlights three possible ways to facilitate such payments:

1) *Appointment of a guardian* -- The preferred option, and the option that should be explored first, is for the appointment of a guardian for the child, pursuant to Article 17 of the Surrogate's Court Procedure Act. Ideally, there is a relative of the child or deceased adoptive parent, or another adult who has a significant positive relationship with the child, who is willing to become the child's guardian. The child must consent to the appointment of any guardian. While the LDSS may object to the person's appointment, the LDSS cannot prevent an interested party from applying in Surrogate's Court for guardianship of the child. Clearly the best scenario would involve agreement among the child, LDSS and the prospective guardian that the prospective guardian's appointment as guardian would be an appropriate plan. If there is no willing or suitable person to be appointed as guardian, or the child does not consent to the appointment of a guardian, then the LDSS that has been paying subsidy must explore the remaining two options.

2) *Direct payments to the child* – The next option to be contemplated would be to provide direct subsidy payments to the child. Such direct payments should only be made if the child "demonstrates the

ability to manage such direct payments." No further statutory guidance is provided. The LDSS must make a determination whether the child has the ability to mange such direct payments. The LDSS should either know, or attempt to find out through discussions with the child and others who know her or him reasonably well, whether the child appears to have the maturity and stability to adequately manage such subsidy payments, including any lump sum retroactive payments going back to when the child's adoptive parent(s) died. The LDSS should maintain sufficient contact with the child to determine that the subsidy payments are being managed appropriately, and, where necessary, provide support to the child to help her or him manage the subsidy payments.

3) *Certifying a representative payee* – If the child does not consent to the appointment of a guardian and if the LDSS determines that the child does not demonstrate the ability to manage direct subsidy payments, the LDSS must then certify payment to a representative payee on behalf of the child. The LDSS must satisfy itself that the prospective representative payee will hold and strictly use the subsidy payments for the use and benefit of the child, and that such use will involve the payee's consultation with the child.

Chapter 518 further addresses potential representative payees by type and offers some considerations concerning their selection. A representative payee may be either: an employee of the social services district with payment responsibility or of the social services district in which the adoptee resides; an employee of a voluntary authorized agency under contract with the LDSS; or a non-agency individual. Regarding employees of a social services district, any person being considered for designation as the child's representative payee must have "no conflict of interest in performing the duties and obligations as a payee." Additionally, as it pertains to designating an employee of a voluntary agency, Chapter 518 states that such designation would be appropriate if the agency has a prior relationship with the child or where the LDSS does not have sufficient or appropriate staff itself to perform the payee function and it would be in the best interests of the child to select a voluntary agency (employee) to be the child's representative payee.

In relation to determining the appropriateness of designating a non-agency individual as the child's representative payee, the LDSS responsible for the payment of adoption subsidy must first consult with the child and give the child's preferences significant weight. However, the child's preference shall be determinative only where such preference does not conflict with the best interests of the child. Prior to designating a non-agency individual for certification as a representative payee the LDSS must:

- Collect proof of identity and verifiable social security number of the nominated representative payee;
- Conduct an in-person interview of the individual;
- Investigate any potential conflicts of interest that may ensue if such individual is certified; and
- Determine the capabilities and qualifications of the individual to manage the subsidy payment of the child.

A child may request an administrative hearing to appeal the refusal of the LDSS to certify the individual preferred by the child for certification as the representative payee or to revoke the certification of a representative payee. Such request for an administrative hearing must be made to OCFS and could result in a fair hearing pursuant to Section 455 of the SSL.

The designated representative payee must submit an annual report by December 31st of each year describing the use of the payments in that year. The LDSS may request additional reports, as it deems necessary. If the representative payee fails to submit a report, the LDSS may require the representative payee appear in person to collect payments. The LDSS must keep a centralized file and update it periodically with information, including social security or taxpayer identification numbers of the representative payee and child.

A LDSS must revoke the certification of a representative payee upon:

- Determining that the representative payee has misused the payments intended for the benefit of the child;
- The failure of the representative payee to submit timely reports or appear in person as required by the LDSS after such failure; or
- The request of the child upon good cause shown.

Regardless of the manner in which the adoption subsidy payments are continued/reinstated, the LDSS must complete and submit an Adoption Subsidy Agreement Amendment to the New York State Adoption Service (NYSAS). Currently, the Amendment is being revised. If assistance is needed prior to the Amendment being revised, or for any other reason, please contact NYSAS. The name of the person receiving the adoption subsidy payments, whether it is the child's guardian, designated representative payee, or the child herself or himself, must be entered into the Foster Adoptive Home Development (FAD). This will allow the Benefits Issuance and Control System (BICS) to issue the monthly adoption subsidy payments in the name of the correct individual.

Under no circumstances may adoption subsidy continue after the child's 21st birthday. Chapter 518 does not impact adoption subsidy cases where the child was under the age of 18 when the adoptive parent(s) died.

Finally, as previously stated, the provisions of Chapter 518 took effect on August 16, 2006. However, the law specifies that the provisions apply to any child who was between the ages of 18 and 21 on August 16, 2006, who would have been eligible for these provisions at the time of the death of their adoptive parent(s) had this law been in effect at such time. If an LDSS is aware of any child between the ages of 18 and 21who became eligible for these provisions before August 16, 2006, and who is still under the age of 21, it should attempt to reinstitute subsidy payments through one of the mechanisms discussed above.

IV. Contact Persons

Questions pertaining to this Administrative Directive may be directed to:

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